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## **CALIFORNIA TITLE INSURERS ARE NOT LIABLE FOR TOXIC CLEANUP COSTS**

*Lick Mill Creek Apartments v. Chicago Title Insurance Company*,  
231 Cal. App. 3d 1654, 283 Cal. Rptr. 231 (Cal. Ct. App. 6th  
Dist. 1991).

**Christopher L. Smith<sup>†</sup>**

### **INTRODUCTION**

On June 17, 1991, the California Court of Appeals for the Sixth District issued its opinion that the standard American Land Title Insurance Association (ALTA) policy does not provide coverage for the costs of removing hazardous substances from insured property.<sup>1</sup> The court followed precedent set by other jurisdictions that had already considered this issue.<sup>2</sup> Specifically, the court found that the insuring language of the policies in question was unambiguous and provided coverage for defects relating only to title, and not for the physical condition of the property.<sup>3</sup> This ruling effectively bars California land owners from seeking compensation from their title insurers for environmental defects of their property in existence at the time of issuance of the title insurance policy.<sup>4</sup>

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1. *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*, 231 Cal. App. 3d 1654 (Cal. Ct. App. 6th Dist. 1991), *review denied*, No. H006961 (Aug. 29, 1991).

2. *Chicago Title Ins. Co. v. Kumar*, 506 N.E.2d 154 (Mass. App. Ct. 1987) (possibility that Massachusetts might attach a future lien as a result of hazardous materials that existed but were unknown at the time that the title insurance policy was issued, did not create a defect in title); *South Shore Bank v. Stewart Title Guar. Co.*, 688 F. Supp. 803 (D. Mass. 1988), *aff'd*, 867 F.2d 607 (1st Cir. 1988) (mere possibility that the Connecticut Commissioner of Environmental Protection might place a lien upon insured property to secure the recovery of public funds used in the remediation of hazardous contamination, did not entitle the insured to recover under their title insurance policy).

3. *Lick Mill*, 231 Cal. App. 3d at 1665.

4. *Id.* at 1662. The court differentiated between marketability of title, which is covered by the title insurance policy, and the market value of the land which is not covered by the policy.

It is significant to note that in this particular case there had apparently been no recordation of a lien for recovery of cleanup costs by any government agency or private party. Had a lien been recorded it would have constituted an encumbrance upon the title, and unless specifically excluded by the title insurance policy should have entitled plaintiff to recover for that defect in title. However, the recordation of a lien was a mere possibility that might encumber the title to the land at some point in the future. As of the date of issuance of the title insurance policies there had been no encumbrance upon the title, but rather a soil condition that might result in a decrease in the market value of the land.

Liability for toxic clean up, in this case, was imposed by operation of the Comprehensive Environmental Response, Compensation and Liability Act of 1980<sup>5</sup> and California's Hazardous Substance Account Act.<sup>6</sup> Liability is imposed upon "the owner or operator" of a property regardless of their participation, or lack thereof, in the release of hazardous substances.<sup>7</sup> Because of the strict liability aspect of this legislation, landowners can inherit from previous owners of their realty the responsibility, as imposed by statute, of removing the hazardous substances present upon the land.

This casenote summarizes the findings of the Sixth District Court of Appeals' opinion regarding *Lick Mill Creek v. Chicago Title Insurance Company*. First, the factual background of the case is outlined. The court's conclusions regarding the language of the title insurance policies, marketability of title, and encumbrance upon title are then presented. A short conclusion follows.

## FACTS

The property, consisting of three connecting parcels, was covered by three separate policies of title insurance that had been issued by Chicago Title Insurance Company and First American Title Insurance Company.<sup>8</sup> Lick Mill Creek Apartments and Prometheus Development Company, Inc.<sup>9</sup> had acquired the first parcel

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5. 42 U.S.C. §§ 9601-9675 (1991) [hereinafter CERCLA].

6. The Hazardous Substance Account Act authorizes the state to oversee the cleanup of hazardous contamination. The act also establishes a fund to assist in paying for the costs associated with cleanup of the contamination. CAL. HEALTH & SAFETY CODE §§ 25300-25382 (West 1992).

7. 42 U.S.C. § 9607(a) (1991).

8. Chicago Title Insurance Company and First American Title Insurance Company will be referred to as Defendant.

9. Lick Mill Creek Apartments and Prometheus Development will be referred to as Plaintiff.

of land in early October 1986. At that time, Defendant issued an American Land Title Insurance Association (ALTA) policy. The second and third parcels were later acquired by Plaintiff, and two additional ALTA policies were again acquired from Defendant. Defendant commissioned a survey and inspection of all three parcels of land prior to issuance of the insurance policies. The survey noted the presence of pipes, tanks, pumps, and other improvements upon the property. The California Department of Health Services, the Regional Water Quality Control Board, and the Santa Clara County Environmental Health Department each maintained records at the time that the title insurance policies were issued regarding the presence of hazardous contaminants upon the three sites. Defendant denied coverage under the title insurance policies. Plaintiff brought suit to recover costs incurred during the cleanup and remediation of the hazardous substances that were present upon the land insured by defendant.

Defendant generally demurred to the initial complaint and the trial court sustained the demurrer on the grounds that the title insurance policies, as issued by defendant, do not provide coverage for the expense incurred in remediation of the preexisting contamination present upon the subject land.

#### THE TITLE INSURANCE POLICIES

Title insurance does not indemnify the insured against casualty losses. Rather, it indemnifies the owners of real or personal property, or the holders of liens or encumbrances against property, against the following: loss or damage suffered as a result of liens or encumbrances on, or defects in the title to the property; invalidity or unenforceability of any liens or encumbrances thereon; or incorrectness of searches relating to the title to real or personal property.<sup>10</sup>

General liability insurance is an entirely separate class of insurance which protects against loss resulting from liability for damage to property or property interests of others.<sup>11</sup> In fact, title insurers

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10. CAL. INS. CODE § 104 (West 1992). The duration of a policy of title insurance is indefinite and there is a one-time premium charged. Title insurers, unlike casualty insurers, are in the business of risk elimination and not that of risk assumption. CAL. INS. CODE § 12340.1 (West 1992). *See generally* JOHN L. HOSACK, CALIFORNIA TITLE INSURANCE PRACTICE 1-31 (1980).

11. CAL. INS. CODE § 108 (West 1992). For a discussion by the California Supreme Court regarding the applicability of "liability" insurance policies to costs incurred under CERCLA, and other related state and federal laws, see *AIU Insurance Co. v. Superior Court* (FMC Corp.), 799 P.2d 1253 (Cal. 1990).

are not granted the statutory authority to issue general liability insurance policies within the state of California.<sup>12</sup>

Despite the statutory barrier which prevents defendant from issuing insurance policies other than title insurance, the court did turn to the insuring language of the policies which defines the limitations of the coverage. The court also noted that the insuring clauses of the three ALTA policies were identical.<sup>13</sup>

#### IMPAIRED MARKETABILITY

The first of plaintiff's contentions addressed by the court was that the presence of the hazardous substances impaired the marketability of the land. In responding to this assertion, the court referred to language from a California Supreme Court decision stating: "One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable."<sup>14</sup> The title insurance policy insured plaintiff against *unmarketability of title*, not against unmarketability of the land. Title to the property was not questioned, but was apparently vested in plaintiff. As the court noted,

"[plaintiff] appears to possess fee simple title to the property for whatever it may be worth; if [plaintiff] has been damaged by false representations in respect to the condition and value of the land, [plaintiff's] remedy would seem to be against others than the insurers of the title [plaintiff] acquired."<sup>15</sup>

The court's analysis on this issue is consistent with that of

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12. CAL. INS. CODE § 12360 (West 1988) provides: "An insurer which anywhere in the United States transacts any class of insurance other than title insurance is not eligible for the issuance of a certificate of authority to transact title insurance in this State nor for the renewal thereof."

13. The insuring clauses of the three policies [hereinafter Clauses] in question read as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF [the insurer] insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

- (1) Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
- (2) Any defect in or lien or encumbrance on such title;
- (3) Lack of a right of access to and from the land; or
- (4) Unmarketability of such title.

*Lick Mill*, 231 Cal. App. 3d at 1660.

14. *Hocking v. Title Insurance & Trust Co.*, 234 P.2d 625, 629 (Cal. 1951).

15. *Lick Mill*, 231 Cal. App. 3d at 1661 (citing to *Hocking*, 234 P.2d at 652).

other jurisdictions considering cases of a similar nature.<sup>16</sup> In a particularly influential case from another jurisdiction, *Chicago Title Insurance Company v. Kumar*, a distinction was drawn between a loss of economic marketability relating to soil conditions, and marketability of title relating to legally recognized incidents of ownership.<sup>17</sup>

An attempt was made by plaintiff to draw a distinction between *Kumar* and the present case. The landowner in *Kumar* had purchased a California Land Title Association (CLTA) policy as opposed to the ALTA policy which had been purchased by plaintiff. Plaintiff noted that the ALTA policy provided greater coverage for off-record risks and potential liens, and required a physical inspection of the insured property. However, this additional coverage extended only to matters affecting title. As the court noted, "marketability of title and the market value of the land itself are separate and distinct, plaintiffs cannot claim coverage for the property's physical condition . . . ."<sup>18</sup>

#### ENCUMBRANCE UPON TITLE

There is also a provision in plaintiff's policy which protects against "any defect in or lien or encumbrance on such title."<sup>19</sup> Plaintiff contended that although no lien had been recorded against the property at the time the title insurance policies were issued, the existence of contamination upon the property was sufficient to constitute an encumbrance upon title.<sup>20</sup> Plaintiff's broad interpretation

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16. See *supra* note 2 and accompanying text.

17. *Chicago Title Insur. Co. v. Kumar*, 506 N.E.2d 154, 157 (Mass. App. Ct. 1987).

18. *Lick Mill*, 231 Cal. App. 3d at 1662. The court also notes that plaintiff did not purchase an environmental protection endorsement (ALTA Form 8.1). *Id.* at 1662 n.2.

19. See generally *Clauses*, *supra* note 13.

20. CAL. CIV. CODE § 1114 (West 1982) defines encumbrance as "taxes, assessments, and all liens upon real property." 42 U.S.C. § 9607(a) (1991) and CAL. HEALTH & SAFETY CODE §§ 25323.5, 25363 (West 1992) provide that the owner of property can be held liable for the cleanup costs associated with a pre-existing contamination by hazardous substances. 42 U.S.C. § 9607(l)(1) (1992) provides for a lien to be recorded by the United States as follows:

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which-

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

Plaintiff reasoned that since a transfer of real property which is contaminated by hazardous substances carries the responsibility for payment of the associated cleanup costs, the liability of these costs would constitute an encumbrance upon title and should therefore be covered by the title insurance policies.

would establish existing hazardous contamination of real property, and possibly other physical conditions, at the time of conveyance, as an encumbrance, unless the condition was visible or known. But since no authority had been offered by Plaintiff to support such an interpretation, the court declined Plaintiff's request.<sup>21</sup>

#### CONCLUSION

Title insurance was designed to eliminate the risk associated with acquiring faulty title to real property. For the payment of a single premium, parties may insure their right as purchaser of, or lender in, real property. This insurance of title provides additional certainty in the transfer and acquisition of rights in land. By denying plaintiff's action, the court upheld the long standing precedent that title insurance does not provide coverage for the physical condition of land. This precedent should not be overturned in light of environmental legislation. To do so would be to force title insurers into the business of conducting environmental audits and insuring against the risk of latent physical defects in land. The court's holding in this case will allow title insurers to continue to provide the certainty required in real property transactions. The responsibility to determine the economic value of the property, based to some extent upon the statutory liability associated with the physical and chemical makeup of the property, will continue to lie with the parties to the transaction.

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21. *Lick Mill*, 231 Cal. App. 3d at 1663.